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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

James K. Smith
Director
Federal Relations



December 9, 1998

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: **Ex Parte Statement**
CC Docket 98-147

Dear Ms. Salas:

On Tuesday, December 8, 1998, John Lenahan, Assistant General Counsel, Terry Appenzeller, Vice President – Open Market Strategy, Lynn Starr, Vice President – Regulatory Affairs, and I met with Larry Strickling, Chief, Common Carrier Bureau, Brent Olsen and Jordon Goldstein to discuss Ameritech's position in the above referenced proceeding as set forth in the attachment hereto.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Lenahan", written in a cursive style.

Attachment

cc: L.Strickling
B.Olsen
J.Goldstein

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AMERITECH LATA BOUNDARY PROPOSAL

I. Summary of Proposal:

- Offers “win-win” opportunity to promote deployment of advanced services by ILECs and CLECs.
- Proposed LATA changes are modest in scope and targeted. Limited to 3 specific purposes, all of which directly further the goals of § 706:
 - In-state Transport of data services for customers with multiple in-state locations;
 - access to packet switches within the state;
 - transport from a packet switch to the closest NAP.
- LATA change available only when BOC complies with:
 - FCC separate subsidiary framework;
 - state & federal rules, & all tariff and interconnection agreement provisions governing collocation and xDSL compatible loops.

II. Summary of Legal Analysis:

- The Proposal Falls Squarely Within the Commission’s Statutory Authority Under Section 3(25) of the Act.
 - The Proposal Meets the Standard the FCC Has Articulated for Exercising its Statutory Authority.
 - Section 3(25), not the MFJ, Controls, but the Ameritech Proposal is Fully Consistent With MFJ Precedent.
 - Ameritech Does Not Seek Forbearance From Section 271.
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Legal Analysis

A. *The Proposal Falls Squarely Within the Commission's Statutory Authority Under Section 3(25) of the Act.*

- Section 3(25) authorizes the FCC to approve LATA boundaries that a BOC has “modified” or “established.” Neither the statute nor the legislative history of the provision suggests any limits to this authority.
 - *Power to Approve “Modified” LATAs:* The FCC has construed its power to “modify” a statutory requirement in broad terms. It has held that its statutory power to “modify” the tariff filing requirements in §203(b)(1) permits it to reduce the 120-day statutory notice requirement to 1 day.
 - *Power to Approve LATAs a BOC has “Established.”* Reference to LATAs that a BOC has established contemplates new LATAs, not just a mere juggling of boundaries in pre-existing LATAs. Obviously, Congress did not contemplate that BOCs would establish new LATAs within the existing LATAs; no BOC would propose tighter restrictions. Thus, Congress had to have contemplated new LATAs that were broader than the pre-existing LATAs.
 - *Relationship of Section 10(d) to Section 3(25):* Even assuming that section 10(d) serves as a check on the Commission's section 3(25) authority, section 10(d) would not prevent the Commission from approving Ameritech's LATA boundary proposal.
 - Dicta in the *US West LATA Boundary Waiver Order* is distinguishable since that dicta related to a proposed state-wide LATA for all services. The proposed LATA change at issue in that order was thus far broader than the change proposed by Ameritech and not targeted to fulfillment of the section 706 mandate.

B. *The Proposal Meets the Standard the FCC Has Articulated for Exercising its Statutory Authority.*

- In the NPRM in this proceeding, the Commission articulated the standard for considering LATA boundary changes: “As a general matter, the Commission, within the discretion granted to it under the Act, weighs the need for the proposed modification against the potential harm from anticompetitive BOC activity, and considers whether the proposed

modification will have a significant effect on the BOC's incentive to open its local market pursuant to section 271." ¶ 190.

- LATA boundary changes are needed to encourage deployment of advanced telecommunications capability:
 - Existing LATAs raise costs by requiring redundant facilities, while simultaneously preventing a BOC from utilizing those facilities in ways that are likely to recover their cost. The increased cost and decreased efficiency reduces incentives to deploy advanced services outside of urban areas. This problem is particularly acute in the Ameritech region, where there are so many small LATAs.
 - Ameritech proposal would reduce unnecessary costs and increase efficiency. Facilities deployed to meet data needs of large users with multiple in-state locations can also be used by smaller, residential consumers.
- No anticompetitive impact. To the contrary, by encouraging BOC to take certain pro-competitive measures, the proposal should promote competition.
- Data affiliate must satisfy FCC separation requirements, as well as applicable loop and collocation requirements.
- Since the proposed LATA changes are limited in scope and narrowly targeted, these changes would not materially affect BOC incentives to pursue section 271 relief.
- Even after proposed LATA changes, BOCs would require 271 relief to meet multi-state or international needs of customers.
- LATA boundary change would only be available to data affiliate that satisfies FCC structural separation framework.
- LATA change would not apply to any circuit-switched services resold by the data affiliate.
- LATA change would not apply to "phone-to-phone" IP telephony.

C. Section 3(25), not the MFJ, Controls, but the Ameritech Proposal is Fully Consistent with MFJ Precedent.

1. The MFJ is Neither Controlling Nor Instructive

- Section 601 of the Act expressly repealed the MFJ, including the cases decided under it. The FCC has recognized that MFJ precedent is not controlling in interpreting the Act. (Qwest Order at n. 168)
- Whereas in the Qwest Order, the FCC found MFJ precedent to be “instructive,” that is not the case here:
 - The MFJ contained no provision comparable to §3(25). LATA boundary changes were made pursuant to the court’s general power to waive the MFJ under sections VII and VIII(C).
 - In considering such waivers, the court was not under any mandate to promote deployment of advanced services.
 - As Commissioner Powell states, it is time for the FCC to move beyond the MFJ and regulate in accordance with today’s realities.

2. The Requested LATA Boundary Change is Fully Consistent With MFJ Precedent in any Event.

- Claims that the MFJ court modified LATAs only to permit ELCS or a change in LATA association are flat-out wrong.¹ The Court repeatedly modified LATA boundaries to permit the efficient provision of new services when such modifications did not pose a substantial risk of competitive harm. Moreover, it did so in a variety of different contexts:
 - The Court repeatedly approved LATA changes for the provision of one-way paging services. *E.g.*, Ameritech received permission to operate a statewide paging network in Michigan.
 - The court granted dozens of waivers permitting BOCs to provide cellular services across LATA boundaries. It also permitted NYNEX to provide service outside its CGSA.

¹ The Common Carrier Bureau has, in fact, recognized that these claims are incorrect. *See Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide Integrated Services Digital Network (ISDN) at Hearne, Texas*, File No. NS-LM-97-26, FCC 98-923 (Com. Car. Bur. May 18, 1998) at ¶ 4.

- In the latter case, it rejected the very arguments made here – that the requested waiver should be denied because it would involve NYNEX in the carriage of interexchange traffic. It held that the waiver “would not impede competition in the market [NYNEX] seeks to enter” and that denying the waiver “would stifle advances in cellular services.”
- The Court permitted the BOCs to provide time and weather services using facilities that crossed LATA boundaries, finding that the provision of these services “has no anticompetitive potential” and that, without a waiver, the “costs [of providing the services] would rise substantially.”
 - The Court also approved requests to permit BOCs to operate cable distribution facilities across LATA boundaries.

D. Ameritech Does not Seek Forbearance From Section 271.

- BOCs would remain fully subject to section 271 restrictions.
 - Old LATA boundaries would continue to govern except for the 3 specified purposes for which revised LATAs were approved.
- The FCC has previously held that even a significant relaxation of a statutory obligation is not tantamount to forbearance. It held that its statutory power to “modify” section 203 permitted it to reduce the 120-day statutory advance filing requirement to 1 day.